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4 Attorneys for Plaintiffs

5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
-----X

7 DAVID HO, on behalf of himself
and all others similarly situated
8 and on behalf of the general
public and DOES #1-20,

9 Plaintiffs,

10 -against-

11 ERNST & YOUNG LLP

12 Defendants.

13 -----X

Case No. 05-04867-JF/HRL

PLAINTIFF'S SECOND MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS AND INFORMATION
FROM DEFENDANT PURSUANT TO
F.R.C.P. RULE 37

Hearing date: May 8, 2007
Hearing time: 10:00 a.m.

14 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

15
16 PLEASE TAKE NOTICE, that the plaintiff, David Ho, hereby moves
17 this Court for an Order compelling the production of documents and
18 information from the defendant, Ernst & Young LLP, such motion to be
19 heard by the Honorable Howard R. Lloyd of this Court on May 8, 2007,
20 at 10:00 a.m.

21 The plaintiff's motion seeks the production of all documents
22 filed by the defendant with any governmental agency in connection
23 with the immigrant or non-immigrant visa status of all members of
24 the putative plaintiff class who were employed by the defendant
25 under such visas.
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

NATURE OF CASE

This is a case for unpaid overtime wages under California law. The defendant employed the plaintiff and numerous other similar persons on a salary basis and often had them working in excess of 40 hours per week. Defendant did not pay overtime wages to the plaintiff and those similarly situated to the plaintiff. Defendant maintains that its pay practices were proper because the plaintiff, and those similarly situated to the plaintiff, were exempt from the overtime pay requirements of California law as salaried "professional" employees. The central issue in this case is whether the plaintiff, and those similarly situated to the plaintiff, were properly treated by defendant as salaried overtime exempt professional employees.

NATURE OF DISCOVERY SOUGHT AND DEFENDANT'S OBJECTIONS

Plaintiff seeks production of all documents filed by the defendant with any governmental agency in connection with the immigrant or non-immigrant visa status of all members of the putative plaintiff class who were employed by the defendant under such visas. These agencies are believed to be limited to the United States Citizenship and Immigration Service and the United States Department of Labor. An unknown number of putative plaintiff class members received non-immigrant visas to be legally employed in the United States by the defendant. Those visas, as explained *infra*, require that such persons be employed in particular capacities and that the nature of such persons' proposed employment in the United States be specified. Plaintiff seeks the production of such documents because they may assist in determining the common (or disparate) nature of the work performed by putative plaintiff class

1 members and whether class action certification should be granted in
2 this case.

3 The plaintiff's request for these materials is furnished
4 (Exhibit "A") along with the defendant's response to that request
5 (Exhibit "B").

6 Plaintiff's request (Exhibit "A", p. 6) directed the defendant
7 to:

8 1. Produce all documents for all persons similarly
9 situated to the plaintiff that were filed with any governmental
10 agency in respect to the immigrant or non-immigrant employment
11 visa status of such persons, such visas allowing such persons
12 to be legally employed in the United States by the defendant
13 (such persons, if they lacked such visas, being unable to be
legally employed by the defendant in the United States). This
request specifically includes all such visa applications for
such persons either filed by the defendant or supported or
sponsored by the defendant including but not limited to all
category "J", "H1B" and "L1B" visas.

14 Defendant has, so far, refused to provide any materials
15 responsive to this request, and set forth its basis for objecting to
16 such production (Exhibit "B", p. 3) as follows:

17 Defendant objects to this Request on the ground that it is
18 overbroad as to time and scope, unduly burdensome, and seeks
19 information not reasonably calculated to lead to the discovery
20 of admissible evidence, including because a class has not been
21 certified in this action. Defendant further objects to this
22 Request on the ground that it is vague and ambiguous as to the
23 terms "persons similarly situated." Defendant further objects
to this request to the extent it seeks information protected by
the attorney client privilege and/or work product doctrine.
Defendant further objects to this Request to the extent it
seeks information, the disclosure of which would constitute an
unwarranted invasion of the affected person's constitutional,
statutory and common-law right of privacy and confidentiality.

24 **WHY THE REQUESTED DISCOVERY SHOULD BE PRODUCED**

25 The Court Must Allow Discovery Relevant
26 To Whether a Class Action Should be Certified

27 In a putative class action case discovery must be allowed of
28 facts bearing on whether class action certification is appropriate.
If such relevant facts are not already known it is likely an abuse

1 of discretion for the District Court to deny such discovery. See,
2 Yafee v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972), cited by Kamm
3 v. California City Development Co., 509 F.2d 205 (9th Cir. 1975).
4 See, also, Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304
5 (9th Cir. 1977).

6 Whether Class Action Certification is Proper
7 In this Case Requires an Examination of the
8 Common Circumstances of the Putative Class

9 A central issue in this case is the nature of the putative
10 plaintiffs' work (i.e., was that work of a professional nature).
11 The *similarity* or *common nature* of the work actually performed by
12 the putative plaintiffs significantly bears on whether this case
13 should be certified as a class action. The circumstances of the
14 putative plaintiffs must be sufficiently common as a *class* or it
15 will not be possible to determine whether they as a *class* were
16 entitled to overtime compensation (i.e., whether they did, or did
17 not, as a class, perform "professional" work).

18 Examining the Visa Application Documents of the
19 Members of the Putative Plaintiff Class Will
20 Assist in Determining the Nature of the Work
21 Actually and Commonly Performed by Such Persons

22 There are several forms of employment based ("non-immigrant")
23 visas that are issued to foreign nationals employed in the United
24 States. The most common (and relevant for purposes of this case)
25 are "J", "H1B", and "L", class visas (all are defined at and named
26 after their respective subsections of, 8 U.S.C. § 1101(a)(15)). All
27 such visas require support from an employer, i.e., the employer must
28 petition for such visa on behalf of the employee and cannot employ
such person until (unless) the visa is issued.

The "J" class visa is primarily a "student" or "training" type

1 visa. If defendant employed class members under "J" visas it was
2 acknowledging that such persons were not expected to perform
3 "professional" work and, presumably, that the common sort of work
4 performed by class members was not "professional" work but the sort
5 of "training" work envisioned by the "J" visa category.

6 The "H1B" visa provides for the employment of certain persons
7 in "speciality occupations." Exactly what qualifies a person to be
8 employed in a "speciality occupation" and receive an "H1B" visa is
9 set forth in 8 C.F.R. 214.2(h)(4). In general, those requirements
10 include a baccalaureate or higher degree or a professional license
11 or specialized professional experience. The employer must also
12 provide certain information to the United States Secretary of Labor
13 regarding such person's proposed employment, their wages, and the
14 affect such employment will have on other workers in the United
15 States. 8 U.S.C. § 1182(t). Putative plaintiffs who were granted
16 "H1B" visas presumably were claimed by the defendant to be
17 performing work different from the sort of "training" work that
18 would be typical (and required) of "J" visa holders.

19 The L visa is an intra-company executive or professional
20 transfer visa. It allows the employment in the United States of
21 persons employed by an employer's overseas subsidiaries or
22 affiliates. Such persons must be employed in the United States in
23 an executive or managerial capacity or in a position for which they
24 have relevant and necessary specialized knowledge. Defendant, if it
25 utilized any "L" visas for putative plaintiff class members, would
26 have had to document the sort of work such persons would be
27 performing in the United States.

28 It is unknown what representations were made by the defendant
in these visa applications about the nature of the work to be

1 performed by putative class members. As noted above, defendant
2 would have made at least some such representations. Some of those
3 representations (in respect to the "J" visas) would be incompatible
4 with the defendant's claims that putative class members were,
5 uniformly, performing "professional" work. These visa applications
6 are properly discoverable since they are likely to contain
7 representations by the defendant as to the work commonly performed
8 by the putative plaintiff class members. And that issue (the
9 commonality, or lack thereof, of the work performed by class
10 members) strongly bears upon the possible class action certification
11 of this case.

12 Defendant Raises No Valid Objection to
13 The Production of These Materials

14 Defendant's objections to the production of these materials are
15 without any sound basis. Defendant's objections, and their abject
16 infirmity, are the following:

- 17 i) "Overbroad as to time and scope and unduly burdensome" -
18 The scope of the documents sought are those that relate to
19 the members of the putative plaintiff class for the
20 relevant class claim period. Accordingly, the request is
21 not overboard as to time or scope. Defendant's claim of
22 "undue burden" is wholly unsubstantiated. There are
23 slightly over 3000 putative plaintiff class members. The
24 vast majority of such persons are *not* immigrant employees
25 of defendant but United States citizens. If 10% of such
26 putative class members were immigrant workers the
27 production sought involves approximately 300 visa
28 applications. Defendant certainly has such visa
applications in its personnel files (in fact, it may very

1 well maintain such files electronically where they can be
2 easily retrieved). Even if these records had to be
3 retrieved and copied by hand, at rate of 10 files an hour,
4 it would take only 30 hours of clerical time to produce
5 such records. In addition, plaintiff's counsel will bear
6 the cost of such production. Accordingly, producing these
7 records will not impose an undue burden upon the
8 defendant.

9
10 ii) "Not reasonably calculated to lead to the discovery of
11 admissible evidence, including because a class has not
12 been certified in this action" - As discussed, this
13 discovery is reasonable likely to lead to admissible and
14 relevant evidence, defendant's own characterizations of
15 the work performed by the members of the putative
16 plaintiff class. The objection that this discovery should
17 not be had because a class has not been certified is
18 plainly inappropriate as the materials are being sought to
19 see whether class certification should be granted.

20
21 iii) "Vague and ambiguous as to the terms "persons similarly
22 situated" - The persons "similarly situated" for which
23 information is sought *are precisely defined in the*
24 *plaintiff's request.* (Ex. "A", p. 5, ¶ 19). That
25 definition is quite detailed and describes such persons by
26 their salary compensation status and the defendant's own
27 classification of such persons by particular job titles.
28 There is nothing vague or ambiguous about which "similarly
situated" persons' information is sought.

1 iv) "Attorney client privilege and/or work product doctrine" -
2 These objections are unintelligible and undetailed.
3 Defendant is not an attorney, and its statements in
4 support of its employees' visa applications are not a
5 privileged attorney-client communication. Nor can any
6 "work product" privilege be at issue, as these visa
7 applications were not prepared in connection with, or in
8 contemplation of, litigation. Defendant has also not
9 provided any privilege list for its privilege claims.

10
11 v) "Unwarranted invasion of the affected person's
12 constitutional, statutory and common-law right of privacy
13 and confidentiality" - These claims are unexplained and it
14 is highly questionable whether any privacy rights are
15 being implicated (the issuance of a visa to a particular
16 person by the United States government is an official, and
17 public, act). In any event, all discovery in this case is
18 subject to an extremely strict confidentiality Order
19 (Docket # 35). Defendant can prevent any breach of any
20 privacy interests by designating all such materials as
21 "confidential." Whether such materials should be
22 considered by the Court, and in what fashion (under seal
23 to preserve some important privacy interest, etc.), can be
24 determined at a later date.

25 Compliance with Local Court Rules 37-2 and 37-1(a)

26 Pursuant to Local Rule 37-2 the moving party who seeks to
27 compel discovery must detail both the reason why it believes the
28 discovery should be compelled and how the proportionality and other
 requirements of FRCP Rule 26(b)(2) are satisfied. Plaintiff submits

EXHIBIT "A"

EXHIBIT "A"

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4 Attorneys for Plaintiffs

5 UNITED STATES DISTRICT COURT
6 NORTHERN DISTRICT OF CALIFORNIA
-----X

7 DAVID HO, on behalf of himself
and all others similarly situated
8 and on behalf of the general
public and DOES #1-20,

Case No. 05-04867-HRL

9 Plaintiffs,

10
11 -against-

12 ERNST & YOUNG LLP

13 Defendants.

14 -----X
15 PLAINTIFF'S SECOND REQUEST FOR THE PRODUCTION OF DOCUMENTS

16 Pursuant to the applicable provisions of the Federal Rules of
17 Civil Procedure § 34 and the Local Rules of this Court plaintiffs
18 request that the defendants produce the following items within 30
19 days of the service of this request or within such other time frame
20 allowed by said Rule at the Law Office of Leon Greenberg,
21 Professional Corporation, attorney for plaintiff, at 633 South 4th
22 Street, Suite 9, Las Vegas, Nevada, 89101, for inspection and
23 copying. This request seeks in the first instance, in lieu of
24 producing such items for inspection and copying, the production of
25 copies of such items which such defendants can produce and/or have
26 delivered on or before such date. If such defendants wish to
27 produce the original items for production and copying they need to
28 contact plaintiff's counsel to confirm their appearance on such date
with such items and/or to arrange another mutually convenient date

1 for such production.

2 **INSTRUCTIONS AND DEFINITIONS**

3 1. These requests should be considered to be continuing, and
4 supplemental answers should be served as further information becomes
5 available pursuant to Rule 26(e) of the Federal Rules of Civil
6 Procedure.

7 2. In complying with this Request for Production of
8 Documents, you are required to produce all documents specified
9 herein that are in your possession, custody or control or which are
10 otherwise available to you.

11 3. If any request herein cannot be complied with in full, it
12 shall be complied with to the extent possible with an explanation as
13 to why full compliance is not possible.

14 4. With respect to each document or communication that is
15 responsive but is withheld, the following additional information
16 shall be provided:

- 17 a) the grounds asserted supporting the failure to produce;
- 18 b) the factual basis for a claim of privilege and/or
19 confidentiality;
- 20 c) the subject matter, date, author, recipient, addressee
21 and number of pages;
- 22 d) the subject matter, date, parties and medium for each
23 communication;
- 24 e) the current or last known location of the document;
25 and
- 26 f) the current or last known person retaining the
27 document.

28 5. If a requested document cannot be located, then identify
such document by setting forth:

- 1 a) the last known person retaining the document;
- 2 b) whether the document is lost and the efforts made to
- 3 locate the lost document;
- 4 c) whether the document was destroyed or discarded and
- 5 the date, manner, reason and person responsible for such action; and
- 6 d) a statement describing the document, including a
- 7 summary of its contents, the author and the persons to whom it was
- 8 sent or shown.

9 6. If any documents which contained responsive information no
10 longer exist, identify each by setting forth:

- 11 a) all the information contained in the document;
- 12 b) the type of document (e.g., letters or memoranda);
- 13 c) the time period when the documents were maintained;
- 14 d) all persons who have or had knowledge of the contents
- 15 of the documents;
- 16 e) the circumstances of the loss or destruction; and
- 17 f) all persons who have knowledge of the loss or
- 18 destruction.

19 7. If any identified document is subject to destruction under
20 any document retention or destruction program, the document(s)
21 should be exempted from any scheduled destruction until the
22 conclusion of this lawsuit or unless otherwise permitted by the
23 Court.

24 8. Separate responses should be given to each document
25 request. If a document is responsive to more than one request,
26 additional copies are not needed, but the subsequent responses
27 should identify the request for which the document was produced.

28 9. The source or sources of each document produced shall be
specifically identified.

1 10. Please produce clear and legible copies of the originals
2 of all documents requested, as well as any and all copies of such
3 original documents that bear any mark or notation not present on the
4 original.

5 11. If in answering these requests, you claim any ambiguity
6 in interpreting either the request or a definition or instruction
7 applicable thereto, such claim shall not be utilized by you as a
8 basis for refusing to respond, but there shall be set forth as part
9 of the response the language deemed to be ambiguous and the
10 interpretation chosen or used in responding to the request.

11 12. Unless otherwise specified, the time period covered by
12 these demands is January 1, 2000 to the present.

13 13. The plural and singular tense shall be deemed to be used
14 throughout these demands and definitions and responses shall be made
15 as if demands were made in both the plural and singular tense
16 regardless of how such demands are actually worded herein.

17 14. The conjunctive and disjunctive tense ("and/or") is to be
18 deemed used throughout these demands and definitions and defendants
19 should respond to all demands as if they are made in both the
20 conjunctive and disjunctive tense except in respect to those demands
21 which clearly qualify a demand by using the conjunctive tense to
22 narrow the scope of the material sought.

23 15. The term "Defendants" refers to all defendants represented
24 by the law office(s) receiving this request.

25 16. In the event that any documents requested for production
26 herein exist in electronic (be it database, word processing, or
27 other computer software) form, or were generated from such
28 electronic form, please specify the electronic form for each
document produced.

1 17. In the event the documents to be produced in response to
2 these requests exceed 500 pages, and the documents to be produced,
3 or some of them, exist in electronic (be it database, word
4 processing, or other computer software) form, or were generated from
5 such electronic form, the production of such documents in their
6 electronic form (and not in paper form) is requested and please
7 contact plaintiff's counsel to make arrangements for the production
8 of such documents in electronic form.

9 18. If a request seeks documents containing information that
10 has not been compiled or organized by the defendants in the exact
11 form requested, but the information requested exists in an
12 electronic form from which such document(s) can be produced, a
13 complete copy of such electronic form (database) can be produced in
14 lieu of the specifically requested documents.

15 19. Persons "similarly situated" to the plaintiff, for the
16 purpose of these requests, means:

17 a) Persons employed by defendant in the State of
18 California at anytime during the four years preceding the
19 commencement of this action to the date of the defendant's response
20 to these requests and who were paid on a salary basis (the term
21 "salary basis" means they were not paid a fixed amount of
22 compensation for each hour or portion thereof worked) and;

23 b) Were classified or denominated as working in non-
24 management positions described by "Department" or "Unit" or other
25 office (such being Tax, Audit, AABS, or another unit, department, or
26 office) and "Staff 1" or "Staff 2" or "Staff 3" or "Senior 1" or
27 "Senior 2" or "Senior 3" or "Financial Management Associates"

28

DOCUMENTS TO BE PRODUCED

1. Produce all documents for all persons similarly situated to the plaintiff that were filed with any governmental agency in respect to the immigrant or non-immigrant employment visa status of such persons, such visas allowing such persons to be legally employed in the United States by the defendant (such persons, if they lacked such visas, being unable to be legally employed by the defendant in the United States). This request specifically includes all such visa applications for such persons either filed by the defendant or supported or sponsored by the defendant including but not limited to all category "J", "H1B" and "L1B" visas.

Dated: Clark County, Nevada
February 21, 2007

Respectfully submitted,

Leon Greenberg, Esq.
LEON GREENBERG PROFESSIONAL CORPORATION
THIERMAN LAW FIRM
Attorney for the Plaintiffs
633 South 4th Street - Suite 9
Las Vegas, Nevada 89101
(702) 383-6085
Nevada Bar Number: 8094

EXHIBIT "B"

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Attorneys for Defendant, ERNST & YOUNG LLP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID HO, on behalf of himself and others
similarly situated and on behalf of the
general public and DOES 1-20

Plaintiff,

v.

ERNST & YOUNG, LLP

Defendant.

Case No. CV 05-04867 JF

[Assigned for all purposes to the Honorable
Jeremy Fogel, Department 3]

**DEFENDANT ERNST & YOUNG, LLP'S
RESPONSES TO PLAINTIFF'S SECOND
REQUEST FOR PRODUCTION OF
DOCUMENTS**

PROPOUNDING PARTY:

Plaintiff, DAVID HO

RESPONDING PARTY:

Defendant, ERNST & YOUNG, LLP

SET NUMBER:

Two

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

Pursuant to Federal Rule of Civil Procedure 34, defendant Ernst & Young, LLP ("Defendant" or "E&Y"), hereby objects and responds as follows to the Request for Production of Documents Set Two propounded by plaintiff David Ho ("Plaintiff").

I. PRELIMINARY STATEMENT

These responses reflect only the current status of Defendant's knowledge, understanding and belief respecting the matters about which inquiry has been made. Discovery in this action is continuing and, consequently, Defendant may not have yet identified all information responsive to this Request for Production of Documents ("Request"). As discovery in this action proceeds, Defendant anticipates that it may discover additional or different information or documents. Without in any way obligating itself to do so, Defendant reserves the right to amend, modify, supplement, clarify or further explain these responses and objections at any time in the future.

Furthermore, these responses are without prejudice to the right of Defendant to use or rely on at any time, any subsequently discovered information, or information omitted from these responses as a result of mistake, error, oversight or inadvertence. Defendant further reserves the right to provide additional information and evidence at any time, and to object on appropriate grounds to the introduction of any portion of these responses into evidence.

These responses are made solely for the purpose of and in relation to discovery conducted in this case. Each response is given subject to all appropriate objections (including but not limited to objections concerning competency, privacy, relevancy, specificity, overbreadth, undue burden, materiality, confidential proprietary or trade secret material, or admissibility), which would require the exclusion of any response contained herein. All such objections therefore are reserved and may be interposed at trial.

Defendant responds to these Requests as it interprets and understands them. If Plaintiff subsequently asserts an interpretation of any Request that differs from Defendant's understanding, Defendant reserves its right to supplement its objections and/or responses herein.

II. GENERAL OBJECTIONS

The following general objections apply to each Request in Plaintiff's Request for Production of Documents Set Three, in addition to any objections that are addressed to particular Requests or subparts of particular Requests:

Defendant objects to the instructions and definitions set forth in Plaintiff's Requests to the extent they purport to alter Defendant's obligations under Federal Rule of Civil Procedure 34.

Defendant objects to each Request to the extent that it imposes any requirements beyond those of the Federal Rules of Civil Procedure. Such Requests are unduly burdensome and exceed the scope of permissible discovery. Defendant will comply with the Federal Rules of Civil Procedure.

Defendant objects to each Request to the extent that it requires disclosure of matters and communications that are protected by the attorney-client privilege, work product doctrine, third parties' right to privacy or any other applicable privilege or immunity. To the extent a Request can be construed to seek privileged or exempt information, Defendant objects and will produce only non-privileged, non-exempt material.

Defendant objects to each Request to the extent that it requires Defendant to provide information and/or documents not presently in its possession, custody or control or to make inquiries of persons or other entities not affiliated with it.

Defendant's responses herein are based upon its understanding of the Requests propounded to it and are based upon and necessarily limited by the information in existence, presently recollected, and presently discovered during the course of preparing these responses. Defendant reserves the right to amend or supplement its responses in the event that its understanding and/or interpretation of any Request is different from that intended by Plaintiff, or in the event that additional information or documents are discovered.

REQUEST FOR PRODUCTION NO. 1:

Produce all documents for all persons similarly situated to the plaintiff that were filed with any governmental agency in respect to the immigrant or non-immigrant employment visa status of such persons, such visas allowing such persons to be legally employed in the United States by the defendant (such persons, if they lacked such visas, being unable to be legally employed by the defendant in the

United States). This request specifically includes all such visa applications for such persons either filed by the defendant or supported or sponsored by the defendant including but not limited to all category "J", "H1B" and "LIB" visas.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Defendant objects to this Request on the ground that it is overbroad as to time and scope, unduly burdensome, and seeks information not reasonably calculated to lead to the discovery of admissible evidence, including because a class has not been certified in this action. Defendant further objects to this Request on the ground that it is vague and ambiguous as to the terms "persons similarly situated." Defendant further objects to this Request to the extent it seeks information protected by the attorney client privilege and/or work product doctrine. Defendant further objects to this Request to the extent it seeks information, the disclosure of which would constitute an unwarranted invasion of the affected person's constitutional, statutory, and common-law right of privacy and confidentiality.

Dated: March 26, 2007

AKIN GUMP STRAUSS HAUER & FELD LLP
Catherine A. Conway
Gregory W. Knopp
S. Adam Spiewak

By 
Gregory W. Knopp
Attorneys for Defendant Ernst & Young LLP

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067.

On March 26, 2007, I served the foregoing document(s) described as:

DEFENDANT ERNST & YOUNG, LLP'S RESPONSES TO PLAINTIFF'S
SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

on the interested party(ies) below, using the following means:

Mark R. Thierman, Esq.
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7287 Lakeside Drive
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Telephone: 775.284.1500
Facsimile: 775.703.5027

Leon Greenberg, Esq.
Attorney at Law
633 South 4th Street, Suite 9
Las Vegas, Nevada 89101
Telephone: 702.383.6085
Facsimile: 702.385.1827

☒ BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or package addressed to the respective address(es) of the party(ies) stated above and placed the envelope(s) for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 26, 2007 at Los Angeles, California.

Sharon Cluff

[Print Name of Person Executing Proof]

[Signature]

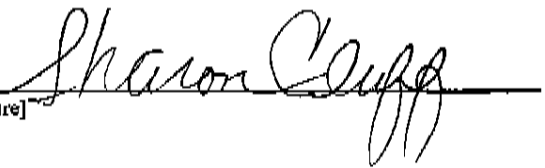


EXHIBIT "C"

1 Mark R. Thierman, SB# 72913
2 Leon Greenberg, SB# 226253
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3 7287 Lakeside Drive
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4 Telephone (775) 284-1500

5 Attorneys for Plaintiffs

6 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

7 -----X

8 DAVID HO, on behalf of himself
and all others similarly situated
and on behalf of the general
9 public and DOES #1-20,

Case No. 05-04867-JF (HRL)

10 Plaintiffs,

11 -against-

12 ERNST & YOUNG LLP

13 Defendants.

14 -----X

15
16 DECLARATION OF LEON GREENBERG, ESQ.

17 Leon Greenberg, hereby affirms, under the penalties of perjury,
18 that:

19
20 1. I am a member of the bar of this Court and the attorney
21 for the plaintiff in this case. I am offering this declaration to
22 detail my good faith efforts to avoid motion practice over the
23 parties' current discovery dispute (involving the plaintiff's second
24 request for production of documents).

25
26 2. On March 28, 2007, I received the defendant's response to
27 the plaintiff's second request for the production of documents. On
28 that date I dispatched a letter by fax to defendant's counsel

1 advising them that such response (which declined to produce any of
2 the requested documents) was improper. I detailed in that letter
3 the reasons why such documents should be produced. I also discussed
4 my position with defendant's counsel on that date via telephone in
5 an attempt to confer about this matter. Defendant's counsel
6 declined to engage in any substantive discussion (i.e., about
7 whether or not such discovery should be produced or in what fashion)
8 about this matter at that time. Defendant's counsel has not advised
9 me that it will produce such documents and, via an email
10 communication on April 2, 2007, stated it was "gathering materials"
11 that it needed to "elucidate" its position. In that communication
12 it suggested that some additional conferral between counsel should
13 be undertaken.
14

15
16 3. I am filing this motion six (6) days after notifying the
17 defendant's counsel of the deficiency of their discovery response.
18 Under the circumstances this is appropriate because:
19

20 i) Despite its suggestion that the parties should "confer"
21 further defendant's counsel has not so conferred nor given
22 any indication that it has any intention of changing its
23 position;
24

25 ii) Discovery is set to close in this case, for the
26 purposes of class certification, no later than July 26,
27 2007 (plaintiff having to present its motion for class
28 certification on July 27, 2007). That is an extremely

1 short period of time as very little discovery has actually
2 been conducted. This time frame (which defendant's
3 counsel has, so far, refused to extend despite my request)
4 simply does not allow for the parties to take weeks to
5 discuss their discovery positions before seeking a ruling
6 from the Court.

7
8 iii) Defendant's counsel's previous suggestions that the
9 parties "confer" about discovery matters has led to a
10 substantial delay in moving discovery forward in this
11 litigation. Specifically, defendant's counsel took 37
12 days to finally advise plaintiff's counsel it would not
13 produce certain vitally important time/billing records.
14 That issue is now the subject of a motion to compel that
15 is before the Court (Docket # 40). The presentation of
16 that motion was unreasonably delayed by such dilatory
17 conduct by the defendant (Docket #40, Ex. "D", ¶ 6).

18
19
20 iv) Defendant's counsel, despite being aware of the very
21 short discovery schedule in this case, has not acted in a
22 diligent and prompt fashion to expedite discovery. It
23 waited the maximum amount of time to respond to the
24 plaintiff's second request for production of documents and
25 then served by mail a response objecting to any
26 production. Now it claims it needs more time to gather
27 documents to "elucidate" its position. This conduct by
28 defendant's counsel, if not intentionally undertaken to

1 deny discovery (by letting the discovery schedule "clock
2 run out"), manifests a lackadaisical, and inappropriate,
3 approach to resolving this discovery issue in light of the
4 parties' discovery schedule. Defendant's counsel could
5 have, and should have, contacted plaintiff's counsel
6 within days of its receipt of the plaintiff's request,
7 immediately gathered its relevant documents so it could
8 "elucidate" its position, and conferred with plaintiff's
9 counsel on an expedited basis. Having neglected to do so
10 it cannot be heard to now complain, under the
11 circumstances of this case, that it has not been afforded
12 a sufficient opportunity to "confer" about this matter.
13

14
15 I have read the foregoing, which is true and correct.
16

17 Affirmed this 3rd Day of April, 2007
18

19 /s/
20

21 _____
Leon Greenberg
22
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of APRIL, 2007, a copy of the foregoing Second Motion to Compel and exhibits were filed with the District Court's CM/ECF system and thus properly forwarded to all counsel through that system. I further certify that there are no counsel or parties appearing in this case who are not registered CM/ECF users and who would require service by mail of such materials.

Affirmed this 3rd day of April, 2007

/s/

Leon Greenberg